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Supreme Court of the United States

OCTOBER TERM, 1942
No. 723

INTERNATIONAL ELEVATING COMPANY,
Appellant,

against

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

REPLY BRIEF FOR INTERNATIONAL ELEVATING COMPANY

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Of Counsel.

INDEX

		PAGE
I	Replying to the Brief for the United States	1
II	Replying to the Brief for the Industrial Commissioner of the State of New York	2
Appendix		4

CASE CITED

Matter of International Elevating Company, New Jersey Unemployment Compensation Commission, Docket No. 353, decided December 22, 1942 1

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REPLY BRIEF FOR INTERNATIONAL ELEVATING COMPANY

I

Replying to the Brief for the United States

The Solicitor General of the United States argues that the threat of double liability for New York and New Jersey taxes, referred to in our main brief, "is more theoretical than real"* (Brief for the United States, pages 27-31).

A recent decision by a referee of the New Jersey Unemployment Compensation Commission, rendered December 22, 1942, annexed as Appendix A to this reply, proves that appellant's fears are more real than theoretical.

> *Matter of International Elevating Company,* New Jersey Unemployment Compensation Commission, Docket No. 353, decided December 22, 1942.

By this decision, which affects the status of elevator employees of International Elevating Company under the

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* The Appellee also suggests that the appellant imagines the possibility of duplication of coverage (Brief for Appellee in No. 783, p. 40).

New Jersey unemployment compensation law, New Jersey may tax the same employment which the State of New York may tax under the decision of the Court of Appeals.

As matters now stand there is an actual conflict between the decision of the Court of Appeals and the existing New Jersey administrative policy. In the event of an affirmance by this Court it is far from clear whether any forum exists in which the conflict may be resolved.

The situation presented gives point to the thesis of the workmen's compensation cases that maritime commerce should not be subject to the burdens of discordant legislation.

II

Replying to the Brief for the Industrial Commissioner of the State of New York.

1.

Appellee states (Brief in No. 723, p. 4):

> "Appellant has conceded that the greater part of the work performed by Bergen in 1938 and 1939, prior to June 3, 1939, was in the State of New York, and that the base of operations after June 3, 1939, was in the State of New York (R. 5)."

The above concession has been repeatedly attributed to this appellant without any foundation in the record. The statement involves legal conclusions which the appellant must continue to dispute (R. pp. 27, 28, 33). The facts found on pages 49 and 50 of the record do not support the concessions which the appellee claims.

2.

Appellee states (Brief in No. 723, pp. 5, 6):

> "No question of inequity exists by reason of the Court of Appeals' reversal of the Attorney General's 1936 opinion, because the legislature has pro-

vided that no taxes shall be collected with respect to wages paid prior to January 1, 1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however."

This appellant is happy to accept the appellee's assurance that the legislature has taken steps to cure the inequity which, but for the legislation to which the appellee refers, admittedly exists*; but it does not afford this appellant relief from the presently existing conflict between New York and New Jersey with respect to its elevator employees.

Dated, Brooklyn, N. Y., April 30, 1943.

Respectfully submitted,

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177 Montague Street,
Brooklyn, N. Y.

JULES HABERMAN,
ROBERT B. LISLE,
Of Counsel.

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* It is noted, however, that the legislation by its terms refers to wages paid to officers or members of crews of vessels. Cf. The Attorney General's brief, Point V, in which it is argued that claimant was not a member of a crew.

Appendix A

24864

File No. 26433
Date December 22, 1942

STATE OF NEW JERSEY

UNEMPLOYMENT COMPENSATION COMMISSION

DOCKET No. 353

IN THE MATTER
of
INTERNATIONAL ELEVATING COMPANY
2 BROADWAY
NEW YORK CITY
Petitioner

Decision

This matter was referred and a hearing conducted in accordance with the rules promulgated under Regulation 10 of the Unemployment Compensation Commission of New Jersey.

The undersigned has considered the record and testimony and makes the following:

FINDING OF FACTS:

The International Elevating Co. (hereinafter referred to as the company), owns and operates a fleet of floating grain elevators which are used for the purpose of loading and unloading grain to and from vessels. They are documented with the United States Customs Office at New York.

Usually on board are the following: a captain, engineer, fireman, deck hand, weigher, millwright, superintendent and a gang of trimmers. The company secured the services of all through a union, with one exception—the superintendent. The union has a closed shop contract with the company. The elevator is propelled under its own power to the scene of operations. The captain, engineer, fireman and deckhand perform services while the vessel is in navigation. Upon arrival at the scene of operations, these individuals assist in the loading and unloading of the grain. In fact, they spend a greater part of their time doing this. The captain acts as an extra weigher, the engineer supplies the necessary power for the shovels and "legs" which are used to load and unload the grain. The deckhand assists in setting the delivery pipe and shifting the grain in the hold of the vessels. The fireman keeps the fire going in the boilers. The millwright attends to the machinery and keeps it in operation. The superintendent directs the loading and unloading of the grain and is in complete authority over all persons on board during this operation. The weighers determine the amount of grain moved according to weight. The trimmers manipulate the leg or funnel through which the grain passes. The superintendent, weighers, and trimmers confine their services to the loading and unloading of the grain. There are no sleeping or restaurant facilities on board. At the end of the day, they usually leave the boat and board it in the morning. They do not sign articles as members of a crew. These individuals board or leave the elevators either in New York or New Jersey, and reside in either state. The elevators are tied up to a dock while not in use, which is located in Jersey City, New Jersey. The main office of the company is in New York. It was admitted that services were performed by these individuals in the State of New Jersey during the calendar year 1936. It was also admitted that if the trimmers were determined to be in "employment", the company would have the status of an employer during the calendar year 1936.

The following points are raised: 1. The services performed by these individuals constitute New York employment. 2. These individuals are officers and members of a crew. 3. If their services are within the provisions of the Unemployment Compensation Law of New Jersey, it is in violation of the Constitution of the United States.

Sections 19(i)(2) and (3) and (7)(C) of the New Jersey Unemployment Compensation Law provide as follows:

> Section 19(i)(2)
> "The term 'employment' shall include an individual's entire service, performed within or both within and without this State if:
>
> (A) The service is localized in this State; or
>
> (B) The service is not localized in any State but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State."
>
> Section 19(i)(3)
> "Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter if contributions are not required and paid with respect to such services under an unemployment compensation law of any other State or of the Federal Government."
>
> Section 19(i)(7)(C)
> "The term 'employment' shall not include service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;"

As to the first point, it was admitted that these individuals perform services within the jurisdiction of the State of New Jersey. While performing such service, the service

was, in fact, *localized.* The loading and unloading of the grain is directed from the vessel by the superintendent who is in charge. This is the base of operations and the place from which the services are directed and controlled. During the time the vessel is located within the territorial limits of the State of New Jersey, services performed thereon are subject to the laws and authority of the State of New Jersey. It is found as a fact that the services performed by these individuals were localized in New Jersey, and the base of operations and the place from which the services were directed and controlled was in the State of New Jersey. Services performed within the territorial limits of the State of New Jersey on a vessel in navigable waters of the United States have been held to constitute employment. See *Shore Fishery, Inc.*, 127 N. J. L. 87, 21 A. (2d) 634.

As to the second point, the services performed by the captain, engineer, fireman and deckhand during the loading and unloading operations without a doubt, constitute employment. The time spent by these individuals in the navigation of the vessel was incidental to the shifting of the grain. Where services are merely incidental to navigation, such services are not excluded from the term "employment". See *Murphy* v. *Menke* (decided by the Supreme Court of Missouri on November 10, 1942). While performing such services, their duties are not those of a member of a crew and do not come within the exclusion of Section 19(i)(7)(C).

The superintendent, weigher and trimmer did not perform any services in connection with the navigation of the vessel. Their services were in the nature of stevedoring. See *In Re Casseratakis* (decided by the N. Y. Court of Appeals, 10-15-42). It is determined as a fact that the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers were not officers or members of a crew, and their services constitute employment.

As to point three, the Unemployment Compensation Law of New Jersey includes services performed in maritime employment, excluding those of officers, and members of a crew performed on a vessel in navigable waters of the United States.

"The Unemployment Compensation Law does * * * not in any way * * * interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (*People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 W. S. 549); taxation of insurance companies upon the writing of marine insurance policies (*Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. (2d) 121); taxes upon shipping (*Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (*Sands* v. *Manistra River Improvement Co.,* 123 U. S. 288).

"A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation.

"The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III, of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley* v. *Board of Wardens,* 12 How. [U. S.] 299).

"It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State."

This is quoted from the decision of the Court of Appeals of the State of New York in the matter of *In Re Casseratakis*. On the third point, see *Shore Fishery, Inc., supra.*

It is determined that the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers performed services constituting employment. They were not performing services as members of a crew and their inclusion within the term "employment" is not in violation of the constitution of the United States.

It is determined that the International Elevating Co. did have eight or more individuals in employment for some portion of a day in twenty different weeks during the calendar year 1936.

DECISION:

The services performed by the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers constitute employment.

The International Elevating Co. is an employer as defined by the New Jersey Unemployment Compensation Commission beginning January 1, 1936.

WILLIAM C. NOWELS,
William C. Nowels, Referee.

Dated:
December 22, 1942.

No. 231.